

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 4, 2006 Session

FRED M. LEONARD, JR. v. CITY OF KNOXVILLE

**Appeal from the Circuit Court for Knox County
No. 3-792-99 Wheeler A. Rosenbalm, Judge**

No. E2005-01899-COA-R3-CV - FILED APRIL 24, 2006

This is an inverse condemnation case. The primary issue presented is whether there is material evidence to support the jury's verdict that Mr. Leonard's claim was not barred by the doctrine of estoppel by deed. Plans were made to improve and widen Gleason Road within the City of Knoxville. To facilitate this project, Mr. Leonard's predecessors in title, the Tiptons, negotiated with and conveyed to the City a portion of their property. Their deed to the City recited that the "consideration ... includes payment for the property taken, also payment for any and all incidental damages to the remainder compensable under eminent domain." The remainder property was eventually conveyed to Mr. Leonard. After the completion of the road project, Mr. Leonard sued for damages, claiming that his property had been damaged by flooding caused by the road project. Following a jury verdict for Mr. Leonard in the amount of \$50,000, the City appealed. Upon review, we held that the trial court erred when it precluded the City from introducing evidence on its defense of estoppel by deed. The case was remanded to the trial court on the sole issue of whether the deed to the City from Mr. Leonard's predecessors in title operated to estop Mr. Leonard from pursuing his inverse condemnation claim. A jury determined that Mr. Leonard was not estopped by deed from recovering damages for the taking of his property by flooding. The trial court reinstated the \$50,000 award to Mr. Leonard and the City appealed again. After careful review, we hold that the jury's verdict is supported by material evidence and that no error was committed by the trial court. The judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P. J. and CHARLES D. SUSANO, JR., J., joined.

Sharon E. Boyce, Knoxville, Tennessee, for Appellant City of Knoxville.

Glenna W. Overton, Knoxville, Tennessee, for Appellee Fred M. Leonard, Jr.

OPINION

I. Factual and Procedural Background

On December 15, 1993, a contract was entered into between the State of Tennessee, Department of Transportation (“TDOT”) and the City of Knoxville (“City”) for a road improvement project on Gleason Road. Pursuant to this contract, TDOT was responsible for designing the project, purchasing a right-of-way on behalf of the City, and supervising the construction. Robert and Linda Tipton owned property on the corner of Forest Oak Drive and Gleason Road. A portion of the Tiptons’ land was needed for the road project. Following negotiations with TDOT, the Tiptons executed a warranty deed conveying a portion of their property to the City for use in the project. The Tiptons retained a portion of their land and a house. They later sold the remaining land and house to Michael Mills, d/b/a M & M Movers. As required by the Tipton’s sales agreement with TDOT, Mr. Mills moved the house that had been on the property conveyed by the Tiptons to the City and placed it on the remainder property. Mr. Mills then conveyed the remainder property, including the house, to Mr. Leonard on December 26, 1997.

Mr. Leonard experienced flooding on his property throughout the course of and following completion of the Gleason Road project. On December 30, 1999, he filed an action alleging that the improvements to Gleason Road had caused water damage and a diminution of the fair market value of his house.¹ He sued the City, Knox County, and Whaley & Sons, Inc. (the TDOT contractor), alleging temporary nuisance, trespass, and inverse condemnation. Plaintiff later non-suited Whaley & Sons, Inc.; Knox County was dismissed from the case by the trial court on summary judgment.

The City answered, denying the allegations and raising, *inter alia*, the affirmative defense of estoppel by deed. In a motion for summary judgment, the City asked to be dismissed from the lawsuit because TDOT designed, purchased the right-of-way, bid, and supervised the construction of the project. After the trial court denied its motion, the City moved again for summary judgment, alleging, *inter alia*, that the doctrine of estoppel by deed barred plaintiff’s action for inverse condemnation. Specifically, the City asserted that Mr. Leonard was estopped from raising an inverse condemnation claim by the consideration and restrictions in the deed of record from his predecessors in title, the Tiptons, to the City. This motion was also denied by the trial court.

A jury trial was held on February 25-28, 2003. The trial judge did not allow the City to introduce evidence of TDOT’s acquisition of property from the Tiptons and the terms and conditions of the Tiptons’ deed of record; the trial proceeded on the sole theory of inverse condemnation. At the close of the evidence, the City made an offer of proof in support of its affirmative defense of estoppel by deed that had been precluded by the trial court. The jury found a taking of Mr. Leonard’s

¹This action was initially brought by Mr. Leonard along with Andrew D. Flick, Jr. and his wife, Mary Anne Flick. Upon Mr. Flick’s death, his wife transferred her interest in the property to her son, Mr. Leonard.

property and awarded Mr. Leonard a \$50,000 verdict against the City. The City appealed to this court, and after review, we determined that the Trial Court erred when it precluded the City from introducing evidence on its defense of estoppel by deed. The case was remanded to the trial court with these instructions:

This case is remanded to the Trial Court on the sole issue of whether the deed between the Tiptons and the City operates to estop Plaintiff from pursuing this inverse condemnation claim. If on remand the City successfully proves this defense, then a judgment will be entered for the City. On the other hand, if the City is unsuccessful in proving this defense, then the Trial Court's previous judgment for Plaintiff will be reinstated in its entirety.

Leonard v. Knox County, Tennessee, 146 S.W.3d 589, 597 (Tenn. Ct. App. 2004).

On March 3, 2005, the case was tried again before a jury on the sole issue of estoppel:

Is the plaintiff, Mr. Leonard, estopped by the language in the deed between Robert and Linda Tipton and the City of Knoxville for recovering damages for the taking of plaintiff's property by flooding?

The jury returned with the answer "no," and the trial court reinstated the \$50,000 award to Mr. Leonard. The City appeals.

II. Issues Presented

We have restated the issues presented for our determination as follows:

1. Whether Mr. Leonard's inverse condemnation claim is barred by the doctrine of estoppel by deed.
2. Whether the trial court's preliminary and concluding instructions, choice of words, rulings, and jury instructions were prejudicial to the City.

III. Standard of Review

An appellate court's review of the judgment entered on a jury's verdict is governed by Tennessee Rule of Appellate Procedure 13(d), which provides that "findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Under this standard of review, the court is "not at liberty to weigh the evidence or to decide where the preponderance lies, but is limited to determining whether there is material evidence to support the verdict." *Crabtree Masonry Co. v. C & R Const., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978) (citing *City of*

Chattanooga v. Rogers, 201 Tenn. 403, 299 S.W.2d 660 (1956); *D.M. Rose & Co. v. Snyder*, 185 Tenn. 499, 206 S.W.2d 897 (1947); *City of Chattanooga v. Ballew*, 49 Tenn. App. 310, 354 S.W.2d 806 (1961); *Dynamic Motel Management, Inc. v. Erwin*, 528 S.W.2d 819 (Tenn. Ct. App. 1975)).

The process of ascertaining the evidentiary support for a jury's verdict is extremely deferential to the verdict. *See Kelley v. Johns*, 96 S.W.3d 189, 194-95 (Tenn. Ct. App. 2002). This narrow search for *any* material evidence is a procedural safeguard to a litigant's constitutional right of trial by jury; thus, it “requires us to take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that tends to support it, to discard all to the contrary, and to allow all reasonable inferences to sustain the verdict.” *D.M. Rose*, 206 S.W.2d at 901; *see Kelley*, 96 S.W.3d at 194. If the record contains any material evidence to support the verdict, the court must affirm the trial court's judgment. *Crabtree Masonry Co.*, 575 S.W.2d at 4; *Forrester v. Stockstill*, 869 S.W.2d 328, 329 (Tenn. 1994).

IV. Estoppel by Deed

The issue before us is whether there is material evidence to support the jury's verdict that Mr. Leonard is not estopped to pursue his claim for inverse condemnation by the language in the deed from the Tiptons to the City. It is the City's position that, as a matter of law, Mr. Leonard is estopped from making a claim for inverse condemnation as a result of the project based upon the following language in the deed from his predecessor in title to the City:

The consideration mentioned herein includes payment for the property taken, *also payment for any and all incidental damages to the remainder compensable under eminent domain.*

[Emphasis added].

The doctrine of estoppel by deed is a legal bar which precludes one party to a deed from asserting against the other party any right or title in derogation of the deed or from denying the truth of any material facts asserted in it. *Blevins v. Johnson County*, 746 S.W. 2d 678, 684 (Tenn. 1988); *Duke v. Hopper*, 486 S.W.2d 744, 748 (Tenn. Ct. App. 1972). A recital in a deed applies and binds the parties to the deed, as well as subsequent purchasers. *Id.* “The privies of a grantor or grantee are estopped to the same extent as the original parties to the deed” and all persons, including heirs, claiming through the party estopped by deed are bound by the estoppel. *Spicer v. Kimes*, 25 Tenn. App. 247, 156 S.W.2d 334, 337 (1941).

There is, however, an exception to the general rule regarding the effect of recitals in deeds as follows:

“[T]he condemnation of a right of way or a right of way by deed embraces by implication all damages necessarily incident to making the land effectual for the particular purpose for which it was acquired. These cases, however, recognize an exception to the rule where the

particular loss or damage was not within the contemplation of the owner and, if advanced, would have been rejected as speculative and conjectural.”

Williams v. Southern Railway Co., 57 Tenn. App. 215, 220, 417 S.W.2d 573, 575 (1966) (citation omitted). This exception is applied when the owner has no notice of any damages to the remainder of the land that would result from the taking and use. *Id.*

This case was remanded to the trial court to allow the parties to present evidence on the issue of estoppel by deed. Both parties presented evidence in this regard. From the record before us, it appears that this issue presented a factual matter to be determined by the jury and not a matter of law. The jury’s verdict reflected its determination that at the time the deed was executed, Mr. Leonard’s predecessor in title and the City did not contemplate there would be any damage to the remainder as a result of the project and therefore, Mr. Leonard was not bound by the language in the deed. After a thorough review of the record, we find there is material evidence from which the jury could have concluded that the loss and damage from flooding were *not* contemplated by either the City or the Tiptons at the time the deed was executed.

The City called as a witness John McKee, the TDOT employee who negotiated the purchase of the Tiptons’ property in 1996. Mr. McKee testified that during negotiations Mr. Tipton looked at the project drawing he was provided, but did not review the plans. Mr. McKee indicated that while negotiating with TDOT, Mr. Tipton was simultaneously discussing the possible sale of the house and remaining property to M & M Movers, since the Tiptons could choose to retain the house upon payment of a salvage fee. Mr. McKee testified that Mr. Tipton was primarily concerned with the price: “He was – no, he – we asked him if he wanted to know more about the property, and we – he didn’t want to discuss any more about it. He was happy with the price.” Mr. McKee noted that Mr. Tipton was pleased with the compensation he received because he had made more money by selling the house and part of the property to TDOT and then reselling the house and remainder of the property to M & M Movers than he would have made if he had sold the house to a third party as originally planned. After initially offering the Tiptons \$165,000, based on an appraisal using the taking and easements shown on the TDOT plans, Mr. McKee subsequently increased the offer by ten percent above the appraised value as permitted under state rules. He indicated that one justification for the increase was that Mr. Tipton was a contractor and could build a residence for less than normal costs, so it was not advantageous for the Tiptons to participate in a relocation program. As a second justification, notes in Mr. McKee’s file indicate the possibility that the Tiptons could seek more than 10% if they initiated litigation regarding the remainder. On cross-examination, Mr. McKee stated incidental damages could result from such things as proximity, noise, and an increase from two to four lanes. The settlement ultimately reached was \$181,610, but because the property owner retained the house for an assigned value of \$2,500, that amount was subtracted for a final settlement amount of \$179,100. Mr. McKee testified that TDOT did not compensate the Tiptons for any damage to the property retained. The TDOT engineers had not indicated the possibility of flooding or sought a drainage easement, and Mr. McKee had not found any incidental damages at all with respect to the remainder area. Thus, he noted that no incidental damages were negotiated

and none were paid. Mr. McKee testified that “if there’s going to be damages,” he would have “included it in the appraisal, and, therefore, we would have paid for – for that as damages. ...” Accordingly, on the TDOT Administrative Settlement, Mr. McKee noted “zero” in the “Damage” category, because TDOT had acquired the house, driveway, landscaping and retaining wall, and he believed there was nothing left to damage. The issue of possible flooding was not raised with the Tiptons since, as Mr. McKee testified, “incidental damages are what’s anticipated damages” In fact, Mr. McKee expressed the opinion that since TDOT put a curb and gutter on the property, less water should have been going there.

Mr. Oliver Farris, Mr. McKee’s supervisor, verified that his office prepared the Tipton deed under his general supervision and recorded it with the Knox County Register of Deeds. He testified that there had been no plan revisions that affected the subject property after 1996. The deed from the Tiptons to the City contained standard language used in most TDOT deeds, which was included “[s]imply because there could be some sort of incidental damage present.” He further replied on cross-examination that “we changed the road grade slightly. We moved the slope more onto the property. There wasn’t a whole lot to damage because we bought the house and all the improvements, so there wasn’t a whole lot left except the land itself.” While admitting that the incidental damage language in the deed did not specifically mention flooding, Mr. Farris noted that “[w]ell, we steepened up the slopes, and sometimes that includes faster runoff.” He stated that no one ever indicated to him that the remaining property would have a flooding problem, and that the plans did not reveal that there was any possibility of flooding to the remainder of the property. Like Mr. McKee, he opined that the plans reflected that TDOT was taking water off of the property. He testified that any incidental damages to the Tipton property would have been considered in the Administrative Settlement that he reviewed.

Mr. Leonard’s predecessor in title, Mr. Tipton, testified that he did not remember any discussion regarding the “incidental damages to the remainder compensable under eminent domain” language during the negotiations. Mr. Tipton noted that he did not consult with an attorney or real estate agent in regard to the sales agreement to discuss what the terms meant, and admitted that when he signed the sales agreement, he did not know the meaning of “incidental damages to the remainder.” While he recalled that Mr. McKee discussed with him the width of the project limits and that the plans showed the project limits across the end of the house, Mr. Tipton testified that the discussions did not address that the project would raise the road elevation or possibly result in flooding.

Mr. Leonard, a contractor, testified that he purchased two houses after they had been moved out of the project limits. Both houses were located on corner lots at Forest Oak Drive and Gleason Road. Prior to purchasing the house and remaining lot at the subject property, Mr. Leonard indicated that he had a title search performed. At the second trial, Mr. Leonard indicated that he had reviewed the TDOT project plans and knew that a slope easement and construction easement had been acquired for the project. He testified that once the flooding started, TDOT represented to him that it would cease once the catch basin and curbs were in. Mr. Leonard noted that he had received a money judgment at the prior trial, but it had not been paid.

Clint Fleming, Vice-President of Whaley & Sons, the TDOT contractor, testified that the project was built according to the plans, except for modifications to the location of a catch basin due to Mr. Leonard's driveway. He opined that the plans did not reflect that the remainder property would experience flooding.

After the City rested its case, Mr. Leonard testified that, in his opinion, the project caused the flooding and water damage to his house.

By asserting the defense of estoppel by deed, the City had the burden to prove that the parties contemplated that the consideration paid included those damages subsequently suffered by plaintiff. *Blevins*, 746 S.W.2d at 686. After careful review of the record in this case, we hold there is material evidence to support the jury's finding that the City did not establish by a preponderance of the evidence that flooding to the remainder property was reasonably anticipated by the Tiptons and the City. During negotiations between the Tiptons and TDOT, damages to the remainder were not discussed. We find it significant that while the TDOT Administrative Settlement shows a break down for improvements, slope easements, land and construction easements, "Damage" was indicated as "zero." As noted by Mr. McKee, "TDOT had acquired the house, driveway, landscaping and retaining wall, it was felt that there was nothing left to damage." Additionally, the testimony of the TDOT representatives reveals that the plans did not put them on notice of potential flooding problems. No witness testified at trial that the parties to the deed contemplated flooding damage to the remainder property at the time the deed was executed. There was no proof that any of the funds paid to the Tiptons were to compensate them for damages to the remainder. Accordingly, we hold there is material evidence to support the jury's verdict.

V. Preliminary and Concluding Instructions, Choice of Words, Rulings, and Jury Instructions

A. Preliminary and Concluding Instructions

Because the trial court had prohibited the City from presenting its estoppel defense in the first trial that resulted in a taking verdict and award of \$50,000, the City filed a motion *in limine* requesting that the second jury's knowledge of the first trial be limited. Specifically, the City asked the trial court "to preclude any mention or reference to the first *Leonard* jury trial, including, but not limited to, exhibits, evidence, testimony, pictures that show water damages or flooding to the house and plaintiff's 300 Forest Oak Drive property, maps, and the jury verdicts and damage award."

In its motion, the City suggested the following factual explanation to orient the jury:

Robert and Linda Tipton owned a house and property at 300 Forest Oak Drive at the corner of Gleason Road and Forest Oak Drive. Because Gleason Road was going to be widened and improved, the Tennessee Department of Transportation on behalf of the City of Knoxville purchased the Tipton house, a portion of the property, a slope easement, a construction easement and any and all incidental

damages to the remainder compensable under eminent domain. The Tiptons were required to move the house from the Project boundaries but were permitted to retain the house as salvage and retained part of the lot. Soon after, the Tiptons sold the house and lot to Michael Mills of M&M Movers. Michael Mills then sold the lot and house to plaintiff. Plaintiff constructed a house on the property during the road project and alleges water damages to the house as a result of the Gleason Road Improvements Project. The sole issue for the jury to decide is whether the deed between the Tiptons and the City operates to estop Plaintiff from pursuing this inverse condemnation claim.

Instead, twice at the beginning and again at the close of trial, the trial court advised the jury of the prior verdict against the City and the \$50,000 damage award as follows:

Mr. Leonard's inverse condemnation suit was tried by this Court and a jury on February 25, 26, 27, and 28 of 2003. In that trial the jury returned a verdict for Mr. Leonard, finding that the improvements to Gleason Road had caused flooding to his property in such a manner as to amount to a taking of that property by the City, and he was awarded \$50,000 in compensatory damages."

....

And so, in this case you're going to be called upon to determine whether Mr. Leonard is estopped by the language in that deed between the Tiptons and the City from recovering damages for flooding of his property. If you determine that he is estopped, then this Court will enter a judgment for the Defendant City, dismissing Mr. Leonard's claim for inverse condemnation. If you determine from the proof and the instructions that I give that Mr. Leonard is not estopped, this Court will reinstate the \$50,000 verdict that a former jury awarded him.

....

If you find from the evidence that the plaintiff is not estopped by the deed between the Tiptons and the City from recovering the damages that Mr. Leonard experienced, then the verdict of the former jury that I told you about will be reinstated and a judgment will be entered for Mr. Leonard in the amount of \$50,000 against the City of Knoxville.

The City asserts that these preliminary and concluding instructions exceeded the scope of the Court of Appeals' directive, and were unnecessary and unduly prejudicial to defendant, which had been prohibited from introducing the defense of estoppel by deed at the first trial when the verdict had been rendered. The trial judge determined that the jurors needed to be advised of such facts in order to better understand their duty in the retrial.

When issues regarding the jury charge are raised on appeal, we review the charge in its entirety and consider it as a whole in order to determine whether the trial court committed prejudicial error. The jury charge will not be invalidated as long as it fairly defines the legal issues involved and does not mislead the jury. *Otis v. Cambridge Mutual Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992).

Courts are not prohibited from commenting to or charging the jury on the evidence as to facts upon which jurors cannot differ. *Underwood v. Waterslides of Mid-America, Inc.*, 823 S.W.2d 171, 178 (Tenn. Ct. App. 1991). In this case, the prior jury's verdict and judgment were established facts in the record. We do not find the instructions to be in error. However, even if the instructions should not have been given, when reviewed in the overall context of the case, it does not affirmatively appear that the instructions actually misled the jury on the estoppel by deed issue. *Grandstaff v. Hawks*, 36 S.W.3d 482, 495-97 (Tenn. Ct. App. 2000). The proof presented at trial clearly supports the judgment. *Loeffler v. Kjellgren*, 884 S.W.2d 463, 471 (Tenn. Ct. App. 1994). Thus, this issue is without merit.

B. Choice of Words

The City further contends that in the presence of the jury during a legal discussion, the trial court used prejudicial terms to express the court's view that Mr. Leonard's property had been taken:

THE COURT: "Was the – these plans show that they're going to dump water over on Mr. Leonard's property?"

....

THE COURT: "But unless you're taking the position that these plans would have showed that if you'd looked at them that there was going to be a lot of water dumped over on his property, I don't see how"

....

THE COURT: "Now, are you taking the position, is the City taking the position in this case if this man had gone and seen the plans that they would have showed that there was water going to be poured up on his property?"

In any trial before a jury, “[t]he extent to which the judge may make comments and remarks ... is governed by the fundamental principle that a judge should say or do nothing to prejudice the rights of the parties.” *State ex rel. Com’r of Dept. of Transp. v. Williams*, 828 S.W.2d 397, 403 (Tenn. Ct. App. 1991) (quoting 75 Am. Jur. 2d *Trial* § 91). While a trial judge is allowed wide discretion in expressing himself or herself during the course of the trial, *see* 75 Am. Jur. 2d *Trial* § 309, “[t]here is a strong policy in Tennessee against a trial judge making statements in the presence of the jury on questions of fact.” *Marress v. Carolina Direct Furniture, Inc.*, 785 S.W.2d 121, 129 (Tenn. Ct. App. 1989). “The constitutional guarantee of a trial by jury requires the judge to be extremely careful *not* to express an opinion on any fact to be passed on by the jury.” *McCay v. Mitchell*, 62 Tenn. App. 424, 463 S.W.2d 710, 721 (Tenn. Ct. App. 1970).

The comments made by the trial judge in this case related to the relevance of knowledge to be derived from looking at the TDOT plans. The judge did not express an opinion as to the weight of any evidence. *Loeffler*, 884 S.W.2d at 473-74. Most significantly, the comments did not relate to an issue of fact to be decided by the jury, as the determination that Mr. Leonard’s property had been taken by the City as a result of the flooding was made by the jury in the first trial.

We find that the words employed by the trial judge were within the discretion afforded to a judge while presiding over a trial. The mere possibility of prejudice from a remark by a judge is not sufficient to overturn a verdict or judgment. *See Roberson v. Netherton*, No. 01A01-9310-CV-00470, 1994 WL 164153 (Tenn. Ct. App., M.S., May 4, 1994). We do not find the trial court erred in its choice of words.

C. Rulings

Further, the City argues that over its objection, the trial court permitted Mr. Leonard to testify regarding his flooding problems; that TDOT had represented to him that the flooding would cease once the catch basin and curbs were in, but that it had gotten worse after the project was completed; and that he had received a money judgment, but had not been paid. The City asserts that permitting Mr. Leonard to testify to issues already tried and outside of the issue of estoppel by deed was prejudicial to defendant.

BY MS. OVERTON:

Q: Okay. Did you have any kind of problem with the property?

A: We had flooding problems.

Q: When did the flooding problems begin?

A: After they started construction on the road.

Q: Did you contact TDOT or the City or anybody about that?

A: Yes.

Q: Did TDOT represent to you anything about the flooding problems?

A: They said that the –

MS. BOYCE: Your Honor, I object.

A: – flooding problems would go away.

MS. BOYCE: I don't think this is relevant.

THE COURT: Pardon?

MS. BOYCE: I don't think this is relevant. He said he had flooding problems, and that's already been tried.

THE COURT: Overruled.

....

Q: What did TDOT represent to you?

A: They said that the flooding problem would go away, that once – once they had the catch basins in and curbs and stuff it would go away.

Q: After Gleason Road, the project was completed, did you suffer flooding problems?

A: It got worse. Yes.

Q: Did you sue the City for that flooding problem?

A: Yes.

Q: Did you try the case? Did we try the case?

A: Yes.

Q: And did you get a jury verdict?

A: Yes, I did.

MS. BOYCE: Your Honor, I will object again for the record. Just, the Court of Appeals said this case would be tried on one issue and just that, estoppel. We've got –

THE COURT: I overrule the objection.

MS. BOYCE: – a prior trial.

THE COURT: Overruled.

BY MS. OVERTON:

Q: Did you receive a money award in the – in the first trial?

A: I received a judgment. I haven't received anything, no.

In Tennessee, admissibility of evidence is within the sound discretion of the trial judge. When arriving at a determination to admit or exclude evidence, a trial court generally is accorded a wide degree of latitude and will be overturned on appeal only where there is a showing of abuse of discretion. *Otis*, 850 S.W.2d at 442; *Davis v. Hall*, 920 S.W.2d 213, 217 (Tenn. Ct. App. 1995). While this court “will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or it is contrary to the governing law,” see *Zakour v. UT Medical Group, Inc.*, No. W2003-01193-COA-R3-CV, 2005 WL 2860237 (Tenn. Ct. App, W.S., Oct. 31, 2005), we find the trial court did not commit error by allowing this testimony. After careful review, we agree with the trial judge that the only way the members of the jury could determine whether the Tiptons and TDOT contemplated the damages suffered by plaintiff was to hear testimony concerning Mr. Leonard's complaints. As to the prior jury verdict and judgment, such was established fact in the record and had been explained to the jury in the preliminary instructions.

D. Jury Instructions

The City further argues that the trial court erred by repeating on six occasions the jury instructions in one form or another as to the City's burden of proof. The City posits that the trial court's excessive instructions more probably than not influenced the jury by exposing the trial court's belief that the City had failed to carry its burden of proof.

Now, the burden of proof rests upon the defendant, City of Knoxville, to prove that plaintiff is estopped. Before you may find that the plaintiff is estopped by the language in that deed, the City must establish by a preponderance of the evidence all of the facts necessary to constitute an estoppel by deed.

....

Now, as I indicated to you, the burden of establishing that Mr. Leonard is estopped by the deed between the Tiptons and the City rests upon the City of Knoxville, and before you can answer this question yes, you must find that the City of Knoxville has established by a preponderance of the evidence, as I've defined that term for you, that Mr. Leonard is estopped.

....

Now, before you can find that the plaintiff's damages are covered by the incidental damage language of the deed between the Tiptons and the City and that the plaintiff is therefore estopped, the City in this case must establish by a preponderance of the evidence that when that deed between the Tiptons and the City was made or executed that the parties to the deed, that is, the Tiptons and the City, contemplated the flooding of the property now owned by Mr. Leonard and that that flooding was reasonably to be anticipated or likely to occur as a result of the improvements done to Gleason Road; and that the parties to that deed, the Tiptons and the City, contemplated that a part of the payment made to the Tiptons was being made for the kind of damages that were later or subsequently suffered by Mr. Leonard, the plaintiff.

...

Let me state that again. That's a lot to digest. In other words, the burden of proof here rests upon the City. The City must establish all of the facts necessary to create an estoppel by deed. They must do that by a preponderance of the evidence. What are those facts necessary in this case to show that there's estoppel by deed?" Those facts that I just mentioned.

In other words, before Mr. Leonard –before you can answer yes to this question and find that Mr. Leonard is estopped, the City of Knoxville must establish by a preponderance of the evidence that when the deed between the Tiptons and the City was made that the Tiptons and the City contemplated that flooding of the property now owned by Mr. Leonard was to be reasonably anticipated at the time that deed was made as a result of the improvements to Gleason Road and that the parties to the deed, the Tiptons and the City, contemplated that a part of the payment that was being made to the Tiptons was being made for the kind of damages subsequently suffered by the plaintiff.

....

If you find that the City of Knoxville has established by a preponderance of the evidence that the Tiptons and the City contemplated flooding to the property at some later date after the deed was executed, that that flooding was to be reasonably anticipated as a result of the improvements to Gleason Road, and that those parties contemplated that the payment being made to the Tiptons was being made for the kind of damages suffered by the plaintiff, then your answer would be yes. And in that case, if that were your answer, Mr. Leonard would be estopped.

If your answer – if you find that the City of Knoxville has not established those elements of estoppel by deed by a preponderance of the evidence, your answer will be no, and Mr. Leonard would not be estopped and judgment would be returned for him.

“[T]he soundness of every jury verdict rests on the fairness and accuracy of the trial court’s instructions. *Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 93-94 (Tenn. Ct. App. 1996). Jury instructions must be “substantially accurate” and “as a whole correct,” but need not be “perfect in every detail.” *Ingram v. Earthman*, 993 S.W.2d 611, 636 (Tenn. Ct. App. 1998); *Ladd*, 939 S.W.2d at 94. Jury instructions are not measured against the standard of perfection, and an instruction will not be invalidated so long as it fairly defines the legal issues involved and does not mislead the jury. *City of Johnson City v. Outdoor West, Inc.*, 947 S.W.2d 855, 858 (Tenn. Ct. App. 1996). This court must review the instructions in their entirety, and examine the challenged instruction in context to determine whether the instructions, as a whole, fairly and accurately embody the parties’ theories. *Ingram*, 993 S.W.2d at 636.

While “it is error for the trial court to single out or give special emphasis to one item of evidence over another,” *Boyd v. Boyd*, 680 S.W.2d 462, 465 (Tenn. 1984), generally, repetition of a legal principle does not invalidate a jury charge. *Boyd v. Hicks*, 774 S.W.2d 622 (Tenn. Ct. App. 1989). Where the reiterated principle of law is correct, reversible error will not be found. *Id.* In this case, we do not find that the repetition, more probably than not, misled the jury or resulted in prejudice to the City. *Cortazzo v. Blackburn*, 912 S.W.2d 735, 745 (Tenn. Ct. App. 1995).

Additionally, the City asserts that the trial court erred in failing to include its requested jury instructions in the charge. Specifically, the trial judge denied the City’s proposed jury instructions 1, 5, 6, 7, 9, 10 and 11. The City contends these instructions went directly to the heart of its legal position and were relevant to the issue remanded by the Court of Appeals.

The proposed instructions at issue are as follows:

No. 1. “Deeds are presumed to be made with great caution, forethought and advice.” McQuiddy Printing Co. v. Hirsig, et al., 134 S.W.2d 197, 204 (1939).

No. 5. Recording a deed is notice of the terms of the deed to a future purchaser of the property.

“Constructive notice is notice implied or imputed by operation of law and arises as a result of the legal act of recording an instrument under a statute by which recordation has the effect of constructive notice.” Blevins v. Johnson County, Tennessee, 746 S.W.2d 678, 683-684 (1988).

No. 6. The purpose of recording deeds is to give notice of the terms of the deed to creditors and future purchasers.

“The object of registration is to give notice to creditors and purchasers.” Blevins v. Johnson County, Tennessee, 746 S.W.2d 678, 684 (1988).

No. 7. “A recital in a deed may give rise to the necessity to make an inquiry to determine the facts recited or be estopped from asserting a state of affairs different from those that would have been revealed by diligent investigation.” Blevins v. Johnson County, Tennessee, 746 S.W.2d 678, 683 (1988).

No. 9. “In condemnation suits, all injuries necessarily incident to the proposed public improvement must be presumed to have been included and compensated for in the award of damages to the landowner.” Central Realty Co. v. City of Chattanooga, 89 S.W.2d 346, 348 (1936).

No. 10. Incidental damages may include water damage and/or flooding. See Leonard v. Knox County, Tennessee, et al., 146 S.W.3d 589, 597 (Tenn. Ct. App. 2004); see also, Dep’t of Trans. v. Wheeler, 2002 WL 31302889 (Tenn. Ct. App. 2002).

No. 11. “In construing a deed, the intention of the drafter is the primary guide.” Bennett v. Langham, 383 S.W.2d 16, 18 (Tenn. 1964).

In regard to the proposed jury instructions, the trial court noted as follows:

[T]he City of Knoxville proposed instruction – that Number 1 is denied.

....

Some deeds – some deeds are prepared – are made with great caution, foresight, and advice, and some aren't. I'm not going to tell this jury that they always are. That's for you all to prove.

....

Mr. Leonard in my judgment is, if – if the Tiptons were estopped, he's estopped whether the deed was recorded or not. He's not estopped because of recordation. He's estopped because of the estoppel by deed law. If he's – if they weren't estopped, he's not estopped. So I don't – I think it only confuses things to tell the jury about recording instruments and constructive notice here.

And so I deny, likewise, the instruction, proposed Instruction 6. In this case I do not believe Instruction 7 is applicable, as I've already indicated. It is denied. ... Instruction – proposed Instruction Number 9 is denied. Proposed Instruction 10 is denied. Proposed Instruction Number 11 is likewise denied.

I would comment in this regard: That proposed instruction [Number 11] talks about the intention of a drafter, and I suppose in a sense the intention of the parties is a part and parcel of what the Court of Appeals is saying here. But I don't think we need to get into intention because I think they've made it very clear that if there's a fact issue here, it's whether or not it was in the anticipation of these parties or contemplation of these parties that flooding damage would occur, and part of the consideration was for that.

....

I – what do we have here to show what their intention is, and how do – what do we have to show that – they may have intended that, but it must have been an undisclosed intention. You haven't offered any proof, have you, that the Tiptons contemplated that there would be flooding and that they were being paid for flooding?

....

Well, what I – what I propose to tell the jury here is that before they can find that Mr. Leonard is estopped, they must find that the City in effect has established that the Tiptons would be estopped from bringing the same kind of action. If the Tiptons would be estopped, Mr. Leonard will be estopped. If the Tiptons aren't estopped, Mr. Leonard is not estopped.

And in order to determine whether there's an estoppel here, the burden is on the City to establish it by a preponderance of the evidence, that when the deed was made between the Tiptons and the City that the parties to that deed, the Tiptons and the City, contemplated that flooding would be reasonably anticipated or likely to occur as a result of the construction of the project, and they contemplated that a part of the consideration was being paid and received for that flooding damage.

The rule in Tennessee is that the trial court should instruct the jury upon every issue of fact and theory of the case raised by the pleadings and supported by the proof. *Street v. Calvert*, 541 S.W.2d 576, 584 (Tenn. 1976). A party is entitled to requested jury instructions (a) if they are supported by the evidence, (b) if they embody a theory relied on by the parties, (c) if they are correct statements of the law, and (d) if their substance is not already contained in other portions of the charge. *Richardson v. Miller*, 44 S.W.3d 1, 27 (Tenn. Ct. App. 2000).

After comparing the proposed instructions with the ones actually given, we hold that the charge delivered to the jury was sufficient to instruct the jurors on their consideration of the evidence before them. *See Sneed v. Stovall*, 156 S.W.3d 1, 10 (Tenn. Ct. App. 2004). A court need not instruct upon issues or theories not supported by the proof. *Ingram*, 993 S.W.2d at 636; *Patton v. Rose*, 892 S.W.2d 410, 416 (Tenn. Ct. App. 1994). *See also Souter v. Cracker Barrel Old Country Store, Inc.*, 895 S.W.2d 681, 684 (Tenn. Ct. App. 1994), citing *Tennessee Farmers Mut. Ins. Co. v. Hinson*, 651 S.W.2d 235, 238 (Tenn. Ct. App. 1983) (trial court did not err in denying special request containing a correct statement of the law that was not applicable to the facts and evidence presented at trial and contained in the record); *Bland v. Allstate Ins. Co.*, 944 S.W.2d 372, 378-79 (Tenn. Ct. App. 1996) (trial court did not err in omitting requested instructions where the evidence was not sufficient to support the instructions). We find the trial judge committed no error in omitting the requested instructions that were not supported by the evidence presented at trial. “It has long been the rule that unless there is evidence to support the charge, the party is not entitled to the charge.” *Underwood*, 823 S.W.2d at 171.

VI. Conclusion

For the foregoing reasons, we affirm the judgment of the court below and remand for such further proceedings as may be necessary. Costs are judged against Appellant, City of Knoxville, for which execution may issue, if necessary.

SHARON G. LEE, JUDGE